

Sometime ago we were informed that a senior Aalim had opined that a public company could be regarded as a valid shirkat (partnership) undertaking. The grounds for this opinion of the respected Mufti Saheb were given as, follows:

- The concept of the independent legal' existence of the company is a fiction of law.

- Upon dissolution of the company, the surplus assets, if any, after payment of liabilities will be distributed pro rata to the shareholders. Hence, the company will be considered in the Shariah as belonging to the shareholders.

We differ with this opinion and find it unacceptable and untenable on the basis of Shar'i Dalaa-il. We had submitted a detailed explanation of the company set-up to the honourable Mufti Saheb. The explanation is reproduced here for the benefit of the Muslim public.

SOME IMPORTANT FACTS PERTAINING TO COMPANIES:

(1) In the capitalist economics of the west a company is considered a legal entity or a legal person apart from those who have purchased shares in it.

Regarding this decree of western law of economics, it has been asserted (by the respected Mufti Saheb) that "the concept of the independent legal existence of the company is a fiction of law". We can not agree with the claim that the company's existence is a fiction of law. In so far as the Shariah is concerned it will be correct to say that such a set-up is a "fiction" since it is quite evident that the Shariah does not recognize an abstract concept as a real, tangible person responsible for rights (huqooq). But in terms of the law (of the land), the company establishment is not fictitious nor is its separate legal status a fiction. The following are our reasons for this claim.

(a) The shareholders are not responsible for the debts of the company. This is a real situation — the actual position, and not fictitious. By law the shareholders are not obliged to pay the debts of the company. In the event of liquidation or insolvency if the company's assets are insufficient to cover the debts, the creditors of the company are the losers. Even if the shareholders happen to be millionaires, creditors cannot claim a cent from such shareholders. But in Islam, the shareholders in a Shirkat (partnership) are responsible to the creditors for the debts incurred. Upon the dissolution of a Shirkat enterprise, the shareholders cannot disclaim responsibility for the debts and they are obliged by the Shariah to pay the debts.

(b) The company is not liable for the debts of its shareholders. Let us assume that Zaid and Bakr are the two shareholders in a company. Zaid owns 50% of the shares and so does Bakr. If Zaid in his private capacity has creditors and Bakr too has his own private creditors, but they have no private property with which to liquidate their private debts, then according to the law of the land Zaid's creditors and Bakr's creditors have no claim in the assets of the company of which both are the shareholders. In the event Zaid and Bakr fail to pay their debts, the creditors will have to suffer the loss. They cannot claim the assets of the company since such assets in law is not the property of Zaid and Bakr. But, in terms of the Shariah, this is an unjust and baatil set-up. According to the Shariah, the creditors will have the right to claim the assets of the company if it is a Shirkat enterprise!

From the aforementioned explanation it will be quite clear that a company or the independent legal existence of a company although fictitious and unlawful in the Shariah, nevertheless, is a real entity and an indisputable fact in western law. The company is a fact which has real and practical effects as outlined above.

(2) THE BASIS FOR THE CLAIM THAT IN THE SHARIAH THE COMPANY WILL BE CONSIDERED AS BELONGING TO THE SHAREHOLDERS has been stated as follows:

"Because upon dissolution of a company, the surplus assets [if any] after payment of liabilities will be distributed PRO RATA to the shareholders, the company will be considered in the Eyes of the Shariat as belonging to the shareholders."

It is quite obvious that the Shariah will rule as follows on this agreement of Zaid, Amr and Bakr:

(a) On the basis of No.(i), the ruling of the Shariah is that such a sale is baatil since the article of the sale (mabee) is not a material commodity (maal). Further, such a transaction constitutes ribaa because the return will be either more or less than the price or amount tendered by Amr and Bakr. In fact, it is the exchange of money for money which in the Shariah is haraam if the terms of exchange are credit — the payment of both sides or of one side being deferred) or inequality [tafaadhul — the One pay- ment being in excess of the other).

(b) In view of the clear stipulation in No.(ii), there remains no scope for ta'weel (interpretation). The seller and the buyer stipulate and agree that no maal is being sold or purchased for the money given by Amr and Bakr. The clear-cut terms eliminate all ambiguity, hence the transaction will not admit the ta'weel that assets (i.e.maal) are being sold or bought.

(c) Condition No.(iii) further enforces the claim that no valid sale in terms of the Shariah transpires and that the article being sold is future profits.

(d) Condition (iv) effectively negates the conception of proportionate ownership rights of Amr and Bakr in Zaid's business. These conditions categorically asserts that Amr and Bakr are not partners in Zaid's business. Their status is merely that of buyers who have purchased a percentage of future profits and not a percentage of the assets in Zaid's business. As stated earlier, this is baaatil and ribaa.

(e) Condition No.(v) reinforces the claim that Amr and Bakr are NOT partners or shareholders in Zaid's business in the Shar'i sense of the meaning of shareholders. This stipulation eliminates all ambiguity and demonstrates clearly that Amr and Bakr have no proportionate rights of ownership in the assets of Zaid's business. Precisely for this reason are they not held liable for the liabilities of Zaid's business.

It should now be very clear that all these conditions invali- date the contract. A transaction with such baatil condit- ions will be null and void in Islam.

We contend that this is not a sufficient basis to decree in terms of the Shariah that the company belongs to the shareholders. Our reasons are:

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Written by Administrator - Last Updated Thursday, 30 September 2010 19:59

The two points, viz. (a) and (b) explained above are of vital significance in determining the status of the share- holders. These two points clearly indicate that the only real concern or connection of the shareholders with the company is the obtainal of profits. The shareholders are not liable for the debts of the company nor is the company liable for the debts of its shareholders. Consider the foll- owing case which will provide us with a good analogy.

Zaid owns a business. Amr and Bakr both 'invesf amounts of money in Zaid's business. Zaid accepts the 'investment* of Amr and Bakr on the following terms:

(i) In return for the money invested, Zaid will pay Amr and Bakr a specified percentage of the profits.